

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

WINTHROP E. TAYLOR,  
  
Plaintiff,  
  
v.  
  
CITY OF PROSSER, et al.,  
  
Defendants.

No. CV-05-5044-FVS

ORDER

**THIS MATTER** comes before the Court for consideration of a number of motions. The plaintiff is represented by Michael J. Kelly and Tyler K. Firkins. The defendants are represented by Michael E. McFarland, Jr.

**BACKGROUND**

The City of Prosser, Washington, hired Winthrop Taylor as its Chief of Police. He began work on March 30, 2001. His relationship with the City was governed by a written, five-year contract. He reported to the Mayor. After becoming Chief, Mr. Taylor began to suspect that municipal employees were behaving illegally. He personally commenced three official "inquiries."<sup>1</sup> Linda Lusk became Mayor during November of 2003. Early in 2004, Chief Taylor and three

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<sup>1</sup>Mr. Taylor distinguishes between "inquiries" and "investigations." Since the distinction is not material to the resolution of the pending motions, the two terms will be used interchangeably herein.

1 other persons met with a member of the Washington State Auditor's  
2 Office to discuss the loss or misappropriation of \$1.4 million in  
3 municipal funds. During roughly the same period of time, the  
4 officers of the Prosser Police Department unanimously agreed that  
5 they lacked confidence in Chief Taylor's leadership. As a result,  
6 the City hired consultants to assess the situation. Chief Taylor  
7 thought that, by the Summer of 2004, the officers' concerns had been  
8 resolved. He seems to have been mistaken. The City asked one of the  
9 consultants to return during the Fall of 2004. There is a dispute  
10 with respect to whether Chief Taylor was willing to implement the  
11 consultant's recommendations. It is undisputed, however, that Mayor  
12 Lusk placed him on paid leave during October and fired him during  
13 December. At the time, his investigations regarding potentially  
14 illegal conduct were still in progress. His successor did not pursue  
15 them. Mr. Taylor filed an action asserting three claims. The first  
16 is that Mayor Lusk violated the First Amendment by firing him in  
17 retaliation for investigating misconduct by municipal employees. The  
18 second claim is that Mayor Lusk fired him in violation of public  
19 policy. The third claim is that Mayor Lusk breached his contract  
20 with the City by firing him. Mr. Taylor seeks both compensatory and  
21 punitive damages pursuant to 42 U.S.C. § 1983.<sup>2</sup> The Court has  
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24 <sup>2</sup>"Section 1983 is not itself a source of substantive rights,  
25 but merely provides a method for vindicating federal rights  
26 elsewhere conferred." *Thornton v. City of St. Helens*, 425 F.3d  
1158, 1164 (9th Cir.2005) (internal punctuation and citations  
omitted).

1 original jurisdiction over the first claim. 28 U.S.C. § 1331, 1343.  
2 The Court may exercise supplemental jurisdiction over the second and  
3 third claims. 28 U.S.C. § 1367.

4 **FIRST AMENDMENT CLAIM**

5 In order to establish a prima facie case of retaliatory  
6 discharge, Mr. Taylor must demonstrate three things: (1) he engaged  
7 in protected speech; (2) Mayor Lusk took some adverse employment  
8 action; and (3) his speech was a substantial or motivating factor for  
9 the adverse employment action. *Thomas v. City of Beaverton*, 379 F.3d  
10 802, 807-08 (9th Cir.2004). The threshold issue is whether Mr.  
11 Taylor can satisfy the first requirement in light of *Garcetti v.*  
12 *Ceballos*, --- U.S. ----, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006).  
13 There, a deputy district attorney became concerned that a deputy  
14 sheriff had misrepresented facts when applying for a search warrant.  
15 126 S.Ct. at 1955. After conducting an investigation of his own, the  
16 deputy district attorney submitted a memo to his superiors urging  
17 them to dismiss the case. 126 S.Ct. at 1955-56. They refused to do  
18 so. Moreover, they allegedly retaliated against him for writing the  
19 memo. 126 S.Ct. at 1956. He filed suit. Among other things, he  
20 argued that his memo was protected by the First Amendment. The  
21 Supreme Court disagreed. Of particular importance to the Court was  
22 the fact that he "spoke as a prosecutor fulfilling a responsibility  
23 to advise his supervisor about how best to proceed with a pending  
24 case[.]" *Id.* at 1960. The Court held "that when public employees  
25 make statements pursuant to their official duties, the employees are  
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1 not speaking as citizens for First Amendment purposes, and the  
2 Constitution does not insulate their communications from employer  
3 discipline." *Id.*

4 Mr. Taylor seems to concede that, with one exception, he acted  
5 and spoke pursuant to his official duties while conducting his  
6 inquiries. The one exception is this: Early in 2004, he and three  
7 other persons -- a City Councilman and two private citizens -- met  
8 with a representative of the state Auditor's Office. They provided  
9 information concerning the loss or misappropriation of \$1.4 million  
10 in municipal funds.<sup>3</sup> Mr. Taylor argues that he spoke as a private  
11 citizen during the course of the meeting.<sup>4</sup> According to him, this  
12 assessment is supported by at least two circumstances. For one  
13 thing, the persons who accompanied him were not law enforcement  
14 officers. For another thing, the representative with whom they spoke  
15 was not part of Mr. Taylor's "chain of command."  
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17 It is true that private citizens were present at the meeting and  
18 that they shared information which they had obtained on their own.  
19 Although relevant, this is not dispositive. Mr. Taylor has stated  
20 repeatedly throughout this action that he was investigating potential  
21 violations of state criminal law. Criminal investigations are the  
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23 <sup>3</sup>Mr. Taylor has not identified with precision any other acts  
24 or statements that allegedly are entitled to constitutional  
25 protection. *Cf. Nunez v. Davis*, 169 F.3d 1222, 1226 (9th  
Cir.1999) (the First Amendment protects more than spoken words).

26 <sup>4</sup>Mr. Taylor has not described in detail what he said during  
the course of the meeting.

1 responsibility of law enforcement officers, who routinely work with  
2 private citizens while investigating suspicious activity.

3 It also is true that the state Auditor's representative was not  
4 Mr. Taylor's superior. However, the record clearly implies that one  
5 of the principal purposes of the meeting was to secure the assistance  
6 of the state Auditor's Office. This is something a law enforcement  
7 officer might be expected to do when investigating allegations of  
8 financial impropriety. Certainly, there is no reason to think Mr.  
9 Taylor would have gone to the meeting had he not been the Chief of  
10 Police.

11 In effect, Mr. Taylor is asking the Court to "compartmentalize"  
12 the comments he made at the 2004 meeting; that is to say, consider  
13 them separately from the other comments he made during the course of  
14 his inquiries. This request finds little support in *Garcetti*.  
15 There, the deputy district attorney's memo was not his only  
16 communication concerning the deputy sheriff's alleged  
17 misrepresentations. His request for dismissal of the criminal case  
18 precipitated a heated meeting with members of the sheriff's  
19 department. Later, he testified at a hearing concerning the validity  
20 of the search warrant. The Supreme Court did not treat either his  
21 comments during the meeting or his testimony at the hearing as  
22 analytically distinct instances of speech. Nor is there any reason  
23 to separate the statements Mr. Taylor made at the 2004 meeting from  
24 other statements he made during the course of his inquiries. These  
25 had been underway for a number of months by the time he spoke with  
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1 the representative of the state Auditor's Office. They continued for  
2 a number of months thereafter. Mr. Taylor's comments at the meeting  
3 were incidental to his inquiries.

4 In sum, Mr. Taylor did not speak as a private citizen during the  
5 course of the 2004 meeting. To the contrary, he spoke pursuant to  
6 his official duties. His statements during the course of the meeting  
7 are not protected by the First Amendment.

8 Even if Mr. Taylor engaged in protected speech, he must show  
9 that it was a substantial motivating factor in Mayor Lusk's decision-  
10 making process. See *Coszalter v. City of Salem*, 320 F.3d 968, 977  
11 (9th Cir.2003). Establishing causation is a significant obstacle in  
12 this case. The record suggests that, by the time Mr. Taylor met with  
13 the representative of the state Auditor's Office, he had made a  
14 number of unprotected statements in furtherance of, and about, his  
15 inquiries. The record also suggests that, after he met with the  
16 representative, he made additional unprotected statements in  
17 furtherance of, and about, his inquiries. Mayor Lusk was entitled to  
18 rely upon Mr. Taylor's unprotected statements in evaluating his  
19 performance and determining whether he should be disciplined.  
20  
21 *Garcetti*, --- U.S. at ----, 126 S.Ct. at 1962 ("We reject . . . the  
22 notion that the First Amendment shields from discipline the  
23 expressions employees make pursuant to their professional duties.").  
24 Given the fact Mr. Taylor made many unprotected statements about his  
25 inquiries, it is difficult to see how he could establish that his  
26 protected statements, rather than his unprotected statements, were a

1 substantial motivating factor in Mayor Lusk's decision-making  
2 process. However, since Mr. Taylor did not engage in protected  
3 speech, the Court need not resolve this issue.

4 **TORT AND CONTRACT CLAIMS**

5 Only Mr. Taylor's tort and contract claims remain. The Court  
6 declines to exercise supplemental jurisdiction over them. 28 U.S.C.  
7 § 1367(c)(3). *See Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350  
8 n.7, 108 S.Ct. 614, 619 n.7, 98 L.Ed.2d 720 (1988) ("[I]n the usual  
9 case in which federal-law claims are eliminated before trial, the  
10 balance of factors . . . will point toward declining to exercise  
11 jurisdiction over the remaining state law-claims.").

12 **IT IS HEREBY ORDERED:**

13 1. The defendants' motion for summary judgment (**Ct. Rec. 39**) is  
14 granted in part. Mr. Taylor's federal claim is dismissed **with**  
15 prejudice. His state claims are dismissed **without** prejudice.

16 2. The defendants' motion to have uncontroverted facts deemed  
17 admitted (**Ct. Rec. 106**) is denied.

18 3. The defendants' three motions to strike (**Ct. Recs. 108, 110,**  
19 **and 112**) are denied as moot.

20 **IT IS SO ORDERED.** The District Court Executive is hereby  
21 directed to file this order, enter judgment accordingly, furnish  
22 copies to counsel, and close the case.

23 **DATED** this 30th day of August, 2006.

24 s/ Fred Van Sickle  
25 Fred Van Sickle  
26 United States District Judge